Cambridge V LLC v Minor
2009 NY Slip Op 30024(U)
January 6, 2009
Surrogate's Court, Nassau County
Docket Number: 316326
Judge: John B. Riordan
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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Cambridge V LLC and QUINCY V LLC,

Petitioners,

File No. 316326

-against-

Dec. No. 668

Lisa Minor, as Executor of the Estate of
SHIRLEY COOPERMAN,

Respondent,

with respect to the Estate of

SHIRLEY COOPERMAN,

Deceased

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This is a proceeding seeking to recover monies allegedly withheld without justification by decedent Shirley Cooperman.

Decedent died on September 25, 2000, leaving a last will and testament which was admitted to probate on December 13, 2000. Letters testamentary issued to Stephen Cooperman. Stephen Cooperman died on February 18, 2008, and successor letters issued to Lisa Minor on April 11, 2008. The will provided that decedent's estate would be distributed in equal shares to Stephen Cooperman, Ellen Abrams and Lisa Minor, all issue of decedent.

BACKGROUND

This proceeding arises out of the formation of two business entities, Combo Stores, Inc. (Combo) and Queens Syndicate Co. (Syndicate), which were formed in or around 1949 by Phillip Cooperman, Aron Shriro and Samuel Stackman to purchase and to manage two parcels of commercial real estate located in Forest Hills, New York. The entities were initially formed as

corporations and in the 1950's dissolved and, upon dissolution, the properties were conveyed by deed to Irving Cooperman, as Phillip Cooperman's sole heir, Samuel Stackman and Aron Shriro as tenants in common. The entities operated thereafter as general partnerships, retaining the Combo and Syndicate names. Each partner's interest was transferred over the years: Irving Cooperman to Shirley Cooperman, then to Shirley Cooperman's children, Stephen Cooperman, Ellen Abrams and Lisa Minor; Samuel Stackman to Aaron Feinerman, then to Marilyn Feinerman; and Aron Shriro to Morris Shriro, then to Ruth Shriro and the Morris Shriro Trust.

Commencing in 1975, decedent Shirley Cooperman managed the partnerships including, among other things, the distribution of partnership drawings. Written partnership agreements regarding management of Combo and Syndicate were entered into in August 1994 by decedent, Ruth Shriro and Aaron Feinerman. By their terms, the agreements are to continue in full force and effect until the sale of the entire premises by the parties. Upon decedent's death in 2000, pursuant to the partnership agreements, Stephen Cooperman became the managing partner of the properties.

In 1965, Aron Shriro entered into an agreement with his then attorney, Hyman E. Kamen, whereby Shriro agreed to pay to Kamen annually a five percent (5%) distribution of all monies, receipts or other distributions received from Shriro's interest in the properties. The agreement provided in pertinent part:

> WHEREAS, [Aron Shriro], though owning such one-third interest in the [properties], actually is obligated to one John Vitlin or his heirs or assigns, for one-half thereof in each of the respective parcels above described, and therefore owns and holds for himself a beneficial interest in each of said parcels to the extent of an undivided one-sixth thereof.
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> * * *

> Commencing with January 1, 1965, [Aron Shriro] agrees to pay to [Kamen] annually five (5%) of any and all income, receipts or other distributions of any kind, nature and description, received from either of the one-sixth interests of [Aron Shriro] in the [properties], immediately upon the receipt thereof, each and every year until the sale of said one-sixth interests or any part thereof.

On or about January 2, 1969, after Aron Shriro's death, Aron's son, Morris, entered into an agreement with Hyman Kamen whereby Morris agreed to assume all obligations of Aron under the January 20, 1965 agreement. In January 1981, Hyman Kamen assigned his interest in the agreements to decedent.

John Vitlin, identified as Aron Shriro's brother, died in 1969. After his death, his interest was transferred to the John Vitlin Trust. In October 2007, the Trust assigned its interest to Victor Vitlin, John Vitlin's son, who then assigned his interests to petitioners, Cambridge V LLC and Quincy V LLC.

THE PETITION

Petitioners, limited liability companies whose sole members and principals are Victor Vitlin and his wife, commenced this proceeding against the estate of Shirley Cooperman asserting a right to one-sixth (1/6) of all income, receipts and distributions from the properties without deduction or reduction of any kind. Petitioners allege that since 1949, their predecessors were passive investors in the partnerships without any involvement with the management of the properties. Petitioners allege that in January 2008, the Vitlins first became aware of the 1965 Kamen agreement and the 5% payment. Petitioners allege that John Vitlin's beneficiaries continue to receive distributions from the properties but subject to decedent's unlawful retention of 5% therefrom. Essentially, they allege that the 5% reduction from the 1/6 interest to which Shriro was entitled was also, and wrongfully, retained from the 1/6 interest to which John Vitlin

and his successors are allegedly entitled. Although petitioners claim to have a partnership interest, there is no direct evidence of any of their predecessors ever having entered into a partnership agreement. The Kamen agreement recites simply that Shriro "is obligated to one John Vitlin," not that they are partners. There is no evidence in the record at this stage identifying the nature of that obligation.

The petition sets forth five causes of action:

1) an accounting by the estate of Shirley Cooperman for all payments the decedent received by reason of the deduction based on the Kamen agreements;

2) a declaratory judgment that the estate is not entitled to withhold or receive any money from the petitioners;

3) unjust enrichment by the decedent and her estate by reason of the withholding of or receiving the distributions due to John Vitlin and his successors;

4) negligence, in that the decedent failed to act with due care and negligently withheld 5% of the distributions;

5) fraud, i.e., decedent intentionally concealed that the 5% deduction was only to be taken from Aron Shriro's 1/6 interest.

THE ANSWER

In the verified answer, respondent asserts six affirmative defenses including the statute of limitations, lack of subject matter jurisdiction, laches, lack of standing and lack of necessary parties to the proceeding.

THE INSTANT MOTION

Respondent moves to dismiss the claim against the estate on the grounds of the statute of limitations, laches, lack of subject matter jurisdiction and failure to state a cause of action.

THE CROSS-MOTION

Petitioners oppose the motion and cross-move for summary judgment on the first cause of action, an accounting, and the second cause of action, declaratory judgment.

The motions are disposed of as hereinafter set forth.

The threshold issue is whether petitioners' predecessors in interest were partners in Combo and Syndicate to whom a duty was owed. Petitioners, citing *Rosenfeld v Kaplan*, 245 AD2d 176, 180 [1st Dept 1997], assert that various federal income tax forms (Petition, Exhibits 4-5) establish that John Vitlin and thereafter, the John Vitlin Trust, were clearly partners of Combo and Syndicate. The estate asserts that petitioners were not partners, citing the 1994 partnership agreements. While the 1994 partnership agreements do not name petitioners' predecessors in interest as partners, that omission is not dispositive of the issue. Triable issues of fact are presented as to whether petitioners' predecessors in interest were partners (*cf.* Partnership Law, §10, 11; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Olson v Smithtown Med. Specialists, P.C.*, 197 AD2d 564 [2d Dept 1993]; *Ramirez v Goldberg*, 82 AD2d 850 [2d Dept 1981]).

Assuming such partnership interest in Combo and Syndicate, respondent asserts that the claim is barred by the statute of limitations. Initially, it is noted that no claim was filed against the decedent's estate pursuant to SCPA 1803. Petitioners seek an accounting of the monies allegedly paid to the decedent from distributions rightfully due the John Vitlin Trust and its

assignees. The essence of the claim, allegedly first discovered in 2008, is that decedent intentionally concealed the deduction from petitioners.

To state a cause of action for fraud, a plaintiff must allege a misrepresentation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury (*Pope v Saget*, 29 AD3d 437 [1st Dept 2006]; *see also Channel Master Corp v Aluminum Ltd Sales,* 4 NY2d 403 [1958]). CPLR 3016(b) requires that the elements of fraud be pleaded in detail (*Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002]). However, a fraud cause of action may be predicated on acts of concealment when the defendant had a duty to disclose material information (*see Kaufman v Cohen*, 307 AD2d 113 [1st Dept 2003]). Thus, where a fiduciary relationship exists, "the mere failure to disclose facts which one is required to disclose may constitute actual fraud, provided the fiduciary possesses the requisite intent to deceive" (*id.* at 120 [citations omitted]). Petitioners' fifth cause of action alleges that decedent intentionally and deliberately concealed her efforts in reducing petitioners' share of partnership distributions. Such allegation states a valid cause of action for actual fraud by decedent (*see Quadrozzi Concrete Corp v Mastroianni*, 56 AD2d 353, 358 [2d Dept 1977], *app dismissed*, 42 NY2d 824 [1977]). In a case alleging concealment, it is not unusual for a plaintiff to be unable to state the facts constituting the fraud in detail since such facts are necessarily "peculiarly within the knowledge of the [defrauding] party" (*Kaufman v Cohen*, 307 AD2d 113, 121 [1st Dept 2003]). Based on the foregoing, the court finds that petitioners have stated a valid claim for fraud and for an accounting.

The applicable limitations period for the fraud cause of action is six (6) years from the

date the cause of action accrued or two years from the time plaintiff discovered or, with reasonable diligence, could have discovered the fraud (*see* CPLR 213 [8]). Petitioners' fraud action would be time barred without the benefit of the discovery rule for actions based upon fraud (CPLR 213[8]; 203[8]). An inquiry is therefore required to determine the time that petitioners could, with reasonable diligence, have discovered the purported fraud. Such inquiry "turns on whether a person of ordinary intelligence possessed knowledge of the facts from which the fraud could be reasonably inferred" (*Ghandour v Shearson Lehman Bros*, 213 AD2d 304, 305 - 306 [1st Dept 1995]). The inquiry is a mixed question of law and fact as to whether petitioners' predecessors in interest could have reasonably discovered the fraud (*cf. Trepuk v Frank*, 44 NY2d 723 [1978]; *Saphir Intl., SA v US PaineWebber, Inc.,* 25 AD2d 315, 316 [1st Dept 2006]). Respondent correctly asserts that petitioners are subject to the defenses or setoffs that could have been asserted against petitioners' predecessors, including the statute of limitations (*see Amodeo Hotels Ltd. Partnership v Zwicker Elec. Co.*, 291 AD2d 322 [1st Dept 2002]; General Obligations Law §13-105). However, the estate's assertion that petitioners' claim is barred on the basis that petitioners' predecessors were somehow put on notice by February 1984 correspondence addressed to Ruth Shriro is unavailing. There is simply no basis on the current record to impute knowledge thereof to petitioners.

As to the accounting cause of action, partners are accountable as fiduciaries (Partnership Law, §43). They owe a duty of exercising the utmost good faith, fairness and loyalty to their partners (*Meinhard v Salmon*, 249 NY 458, 464 [1928]). Here, petitioners' request for an accounting and the estate's rejection of said request is in the nature of a determination of the validity of the petitioners' claim (SCPA 1808[5]). However, the petitioners have not even

established that they are partners entitled to an accounting of the partnership, nor have they established that they are creditors of the estate entitled to an accounting by the executor. Accordingly, their cross-motion for summary judgment compelling an accounting is denied.

In the second cause of action, petitioners seek a declaratory judgment that the estate is not entitled to demand, collect, or receive any part of the one-sixth (1/6) of the distributions due petitioners from the properties. In the third cause of action, petitioners assert that decedent has been unjustly enriched by withholding five (5) percent of distributions rightfully due John Vitlin and his successors.

> "It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), the question is not whether the party pleading the claim will ultimately prevail, but whether the claim states a cause of action. For the purposes of this review, the allegations in the pleading must be assumed to be true, and liberally construed giving the pleading party the benefit of every favorable inference" (*Williams v Aliano* 246 AD2d 592, 592 [2d Dept 1988] [citations omitted]; *see also Leon v Martinez*, 84 NY2d 83, 87 [1994]).

The application to dismiss the second and third causes of action is denied. As to the second cause of action, this court may provide relief to petitioners in the form of a declaratory judgment (*cf. Matter of Beiny*, 16 AD3d 221 [2d Dept 2005]; *Rosiny v Schmidt*, 185 AD2d 727 [1st Dept 1992)]; *Matter of Langfur*, 198 AD2d 355 [2d Dept 1993]). As to the third cause of action, unjust enrichment, assuming the allegations in the pleading to be true and giving the pleading party the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), a cause of action is stated. "A cause of action for unjust enrichment arises when one party possesses money or obtains a benefit that in equity and good conscience they should not have obtained or possessed because it rightfully belongs to another" (*Mente v Wenzel*, 178 AD2d 705 [3d Dept 1991]; *see Parsa v State of New York*, 64 NY2d 143 [1984]). The essence of such

a cause of action is that one party is in possession of money or property that rightly belongs to another (*see Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415 [1972]; *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983 [3d Dept 2006]).

Petitioners' fourth cause of action, sounding in negligence against the decedent, is dismissed as that is governed by a three-year statute of limitations (CPLR 214[3]).

Respondent contends that petitioners' claim is barred by laches as respondent has been prejudiced by the lapse of time and many of the principals are now deceased. The court rejects such contention at this juncture as laches cannot be imputed to parties justifiably ignorant of the facts (*Matter of Barabash*, 31 NY2d 76, 82 [1972]). In *Barabash*, the court stated that "the essential element of laches, namely, prejudice, is not spelled out by the mere lapse of time with all the 'attendant consequences' thereto . . ." (*id.*). As there is an issue of fact as to whether petitioners' predecessors in interest should have known of the facts giving rise to the cause of action, the claim is not dismissed on the basis of laches at this stage.

CONCLUSION

The motion to dismiss the five causes of action asserted in the petition is granted to the extent of dismissing the third cause of action as indicated.

There is a threshold issue as to whether petitioners' predecessors in interest were partners of Combo and Syndicate to whom a duty was owed. That issue requires an evidentiary hearing. A conference is scheduled for January 21, 2009, at 9:30 a.m., with a member of the court's law department to facilitate scheduling and any discovery.

The cross-motion by petitioners for summary judgment on the first and second causes of action is denied in accordance with the foregoing.

The above constitutes the order and decision of this court.

Dated: January 6, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court